

INTERNATIONAL CITY MANAGERS' ASSOCIATION

1313 EAST 60TH STREET - CHICAGO 37, ILLINOIS

Route To:

This report was prepared in response to an inquiry from a municipality subscribing to this Service and is distributed to all subscribers. The contents may not be reproduced without permission.

Return To:

REGULATION OF PEDDLERS, SOLICITORS, AND ITINERANT MERCHANTS

What problems do cities encounter in regulating house-to-house and other selling activities of itinerants and transients? How can cities legally regulate these activities and how can such regulations be enforced effectively?

Municipal regulation of transitory retailers presents many complex problems for city officials. On one hand, local merchants frequently desire to prohibit these activities, but such action by the government is often impossible in the light of federal and state court decisions. Furthermore, some citizens like this method of buying goods and sharply criticize the city when it seeks to impose severe regulatory measures. On the other hand, although many well-known companies depend upon manufacturer-to-consumer merchandising and employ honest salesmen, house-to-house selling in itself provides a means by which unscrupulous persons are sometimes able to commit fraud or other criminal acts in a community. Moreover, both legitimate and illegitimate transient retailers are characterized by a "here-today, gone-tomorrow" type of operation, which makes for a much more difficult police problem. By the time a citizen suspects that fraud may have been committed, the suspected transient often will have already left the community, making it difficult, if not impossible, to trace him.

To protect citizens from so-called "confidence men," representing themselves as peddlers and solicitors, many cities have adopted ordinances regulating both resident and nonresident peddlers, solicitors, and itinerant merchants who desire to operate within the city. Cities derive their authority to regulate these activities from their police powers. Municipal regulations dealing with these practices must be reasonable and cannot be arbitrary or discriminatory as the courts generally will declare void any ordinance intended to benefit a particular class or which is not directly related to public health, safety or morals.

Definitions

Peddlers. A peddler travels about selling small goods and wares which he carries with him. The necessary elements to constitute a peddler are: (1) he has no fixed place of business but travels from place to place; (2) his wares or goods are carried with him; (3) he is prepared to deliver his wares at the same time he solicits business; and (4) sales are ordinarily made to consumers and not to dealers. Peddlers are sometimes referred to as "hawkers" or "hucksters," and although there are minor technical differences in definition, the terms "hawker" and "huckster" will be considered as synonymous with "peddler" for the purposes of this report.

Solicitor or Canvasser. A solicitor or canvasser is a person who goes from house to house in an effort to take orders for goods for future delivery. He may or may not use samples in soliciting an order.

Itinerant Merchant or Vendor. An itinerant merchant or vendor is located in the city for a short period of time and during this interval makes sales and delivery of goods like other established merchants in the community. The itinerant merchant

is distinguished from peddlers in that he conducts a business from a fixed place within the community for a definite and limited period of time.

Limitations upon Municipal Regulatory Authority

The extent to which cities may regulate itinerant retailing under their police powers is limited in many respects by federal and state court decisions. Considerable legal study of all such court decisions by the city's legal counsel is necessary before an ordinance or ordinances regulating itinerant retailers is adopted. Federal court decisions on the subject are important guides for cities of all states. However, state limitations on the regulatory authority of cities vary greatly. Therefore, a city should adopt such ordinances only after a thorough study of pertinent statutes, court decisions and practices of the state in which it is located.

Some of the more general limitations on the authority of cities to regulate itinerant retailers, as specified by federal and state court decisions, are discussed in the following sections.

Interstate Commerce

Cities are often uncertain as to how far they may go in regulating itinerant retailers whose methods of conducting business place them in interstate commerce. The power to regulate interstate commerce rests with the federal government and through the years the courts have expanded and protected this power. However, cities may impose certain limited regulations on itinerant retailers engaged in interstate commerce provided such regulations do not place an "undue burden" on interstate commerce.

Canvassers and solicitors take orders for future deliveries and the goods or products frequently are shipped from another state directly from the manufacturer to the consumer. A number of companies operating on a nationwide scale utilize this means of conducting business, and their agents are engaging in interstate commerce since the goods are imported from without the state. This class of itinerant retailer therefore is benefited the most by the protection afforded by the interstate commerce clause.

Municipal regulations applied to solicitors engaged in interstate commerce are a valid exercise of the police power and a license fee can be required if it is not primarily a revenue raising measure. The courts have held that the object of such a license is not to derive revenue but to protect the public under the city's general police power. Some cities merely charge a nominal fee to cover the cost of issuing a solicitor's permit, while others may not charge any fee but nevertheless require solicitors to register with municipal authorities. Not only does the community benefit from such regulation, but solicitors representing reputable companies generally welcome these requirements, since they provide them with suitable identification and help to protect them and their companies from undesirable persons posing as agents of the companies.

Whereas it is clear that cities may impose reasonable regulations on itinerant retailers engaged in interstate commerce, it is often difficult to establish a line of demarcation between what is interstate commerce and what is intrastate commerce. Generally the test of interstate commerce is whether importation from another state is involved, although the specific legal effect of the federal commerce clause upon various aspects of commerce among states has never been exactly defined. The U. S. Supreme Court has said that "the precise line can be drawn only as individual cases arise, but the distinction is clear in principle." In other words, no exact formula

can be devised for all cases to determine in advance whether or not a regulatory action by a municipality is prohibited by the federal commerce clause.

Intrastate Commerce

Transactions, manufacture, transportation, and distribution wholly within a state constitute intrastate commerce and may be regulated by the states and their municipalities. Through the years state court decisions have been handed down which place certain limits on municipal regulations designed to control the activities of itinerant retailers. These limitations are described briefly in the following sections.

Discrimination. Some cities have attempted to place local business in a favored position by refusing to grant a license to nonresident itinerant retailers or by charging them prohibitive fees for licenses. Although court decisions are not uniform on the subject, such discriminatory ordinances generally have been declared invalid. The courts will carefully scrutinize the underlying motives and purposes of the city in enacting such an ordinance. State courts have ruled that ordinances with requirements such as the following are discriminatory and invalid: requiring nonresident peddlers and itinerant merchants to obtain a license and pay a fee but exempting residents; requiring a high license fee from nonresident peddlers but not from residents; requiring all peddlers operating within the city limits to be residents of the city; and imposing a fee on solicitors in business for less than a year that is five times the amount charged solicitors in business more than a year.

Class Exemptions. State statutes or local ordinances sometimes may exempt certain persons from municipal licensing requirements for peddlers, solicitors and itinerant merchants. Farmers selling produce, which they have raised themselves, is a category sometimes exempted from provisions of regulatory ordinances.

Federal, state and local governments historically have granted various special privileges and concessions to war veterans as a reward for their services to their country. This is the basis which some states and cities have used to exempt veterans from licensing requirements for itinerant retailers. The majority of state court decisions, however, have held that such exemptions are invalid. Eight state supreme courts have held that such exemptions to veterans, without any reference to whether they are indigent or disabled, are unconstitutional as granting a special privilege to a certain class. Only the New Jersey supreme court has held to the contrary. The eight states include Iowa, Illinois, Massachusetts, Mississippi, South Carolina, Vermont, Washington, and Wisconsin. In Georgia and Oklahoma, legislation exempting indigent and disabled veterans from payment of peddlers' license fees has been upheld, but in Arkansas and Texas it has been ruled as invalid.

The selling of farm products by the farmers is an exemption which cities in some states may validly make. Such exemptions may be in the regulatory ordinance itself or in state statutes. Since certain states have held this type of exemption to be invalid, however, each city should consult the court decisions in its state before exempting or attempting to license farmers selling products they have raised themselves.

Reasonableness of License Fees. Unless a city has specific authority to license for revenue purposes, license fees must be justified as a police regulation and bear a reasonable relationship to the expenses involved in investigation, issuing a license, regulation and supervision. If not, the city may face the charge of discrimination and deprivation of property without due process of law.

Whether or not a particular license fee is reasonable or unreasonable is a judicial question, but cities are generally allowed a wide discretion in establishing

the fee. Nevertheless, there is no set pattern for cities to follow in establishing license fees for peddlers and solicitors since fees will vary from state to state and even from city to city within a state, depending on what state courts have held to be reasonable and whether the city has authority to license for revenue purposes or only for regulation. Each city must conduct its own analysis in this respect and fix its fees accordingly.

Assessments of higher license fees against peddlers and itinerant merchants than against merchants permanently located in the city have been upheld by some state courts. The basis for a higher fee is to insure proper police supervision, the absence of which might result in injury to citizens dealing with itinerants, because the nature of their occupations furnishes ample opportunity for fraud. Although the cost of issuing a license might be the same for both the permanent merchant and the transient, the cost of police supervision may well be relatively much greater for the transient than the resident merchant.

Summary

1. Municipal ordinances regulating peddlers, solicitors and itinerant merchants must conform to federal and state constitutions, legislation and court decisions. In drafting an ordinance to regulate itinerants, a city should have its legal counsel check all related court decisions to see if the proposed ordinance meets the requirements of state and federal laws.

2. "Undue burdens" may not be imposed upon persons engaged in interstate commerce. This requirement particularly restricts the city's authority to regulate solicitors and canvassers who take orders for goods which are shipped directly from a manufacturer located out of the state to the customer.

3. Unreasonable discrimination against nonresidents and unreasonable special classifications should be avoided in regulating all types of itinerant retailing activities.

4. A license fee charged itinerant retailers for the purpose of regulation under police power must bear a reasonable relationship to the cost of regulation. If a city has authority to license for the purpose of raising revenue, the charges must not be so high as to be oppressive or confiscatory.

Methods of Regulating Itinerant Retailers

Prohibition as a Nuisance. Many local business men, especially those who compete with itinerant retailers, would like to prohibit itinerant selling entirely, at least that which is solely in intrastate commerce. The majority of court decisions on this subject, however, have held that prohibition of peddling and house-to-house selling as such is not a valid exercise of police powers.

Nevertheless, many cities have for all practical purposes prohibited door-to-door selling by itinerants by adopting ordinances which do not prohibit the activity itself but prohibit the technique used by peddlers and similar persons--peddling or soliciting without having been requested or invited by the resident. This type of ordinance also declares the practice of uninvited house-to-house peddling and soliciting to be a public nuisance punishable by fine and imprisonment. Such ordinances make no distinction between residents and nonresidents.

The first such ordinance was adopted in 1931 in Green River, Wyo., and similar ordinances adopted by other cities are generally known as "Green River ordinances."

The ordinance's great popularity among cities and the many court tests of its constitutionality, instigated primarily by national companies operating in interstate commerce, have made it a well known and controversial ordinance. From 1935 to 1939 over 400 cities adopted such ordinances. In the next few years 17 state supreme courts ruled on the validity of the ordinance, with five states finding it valid and 12 invalid. After the U. S. Supreme Court ruled in 1951 that a Green River type ordinance did not violate the federal constitution, a great many additional cities moved to adopt similar ordinances.

In the landmark case of Breard v. City of Alexandria 341 U. S. 622 (1951), the U. S. Supreme Court ruled that the Green River type of ordinance as adopted by Alexandria, Louisiana, did not violate federal interstate commerce powers and federal requirements of due process. The case was brought by a solicitor representing a magazine distributor in another state. The constitutionality of the ordinance turned upon a balancing of the householder's desire for privacy and the curbing of annoyances by uninvited solicitors, on the one hand, against the publisher's right to distribute publications in the precise way that would bring the best results. The court held that the ordinance left open the usual methods of seeking business and that it was immaterial constitutionally that such methods do not produce as much business as unrestricted house-to-house canvassing. Prohibition or discrimination against interstate commerce was not involved since the regulation placed both out-of-state sellers and local sellers on the same basis.

The court said: "To the city council falls the duty of protecting its citizens if the practice is deemed subversive of privacy and of quiet. The householder depends for protection on a city board rather than churlishly guarding his entrances with orders forbidding the entrance of solicitors. A sign would have to be a small billboard to make the differentiation between the welcome and the unwelcome. They can be written in an ordinance once cheaply for all homes."

The Breard case concerned the Green River type ordinance only insofar as violations of the Federal constitution were concerned, and in no respect was related to possible violations of state constitutions or statutes. The Green River ordinance has been held invalid by the supreme courts of 12 states upon one or more of the following grounds: (1) house-to-house canvassing is in fact either no nuisance at all or only a private nuisance and not a public one, and therefore not subject to abatement by the city under its police powers; (2) it is an arbitrary attempt to interfere with private business by prohibiting lawful occupations under the guise of police protection; (3) it constitutes an improper exercise of police power; and (4) the city does not have the authority to enact the ordinance under its delegated powers. It should be noted, however, that all 12 state court decisions were made prior to 1951. It is not as yet clear whether the reasoning of the U. S. Supreme Court will influence the state courts in future considerations of this problem.

Model Regulatory Ordinances. In 1947 the National Institute of Municipal Law Officers published a comprehensive legal study on the regulation of itinerants, entitled "Municipal Regulation of Peddlers, Solicitors and Itinerant Merchants (730 Jackson Place, N.W., Washington 6, D. C. 1947. 165pp. \$5). Based on the study of relevant court decisions, the report concluded that the best means of regulating itinerant selling is to adopt separate regulatory ordinances for each of the three separate categories of itinerants: (1) peddlers, hawkers, and hucksters, (2) solicitors and canvassers, and (3) itinerant merchants or vendors. The requirement of separate ordinances is a logical extension of the court decisions which have made distinctions between the three itinerant occupations. The definitions at the beginning of this report summarize the differences between the three categories.

Another "model" ordinance has been prepared by the League of Wisconsin Municipalities (see "The Regulation of Peddlers and Transient Merchants," The Municipality, May, 1950, p. 95. 30 E. Johnson Street, Madison). This ordinance, although primarily based on the NIMLO study, regulates the three types of itinerants in one ordinance. In addition, it also includes a section which applies to charitable and religious solicitations. Most cities, however, regulate charitable and religious solicitations in a separate ordinance and this appears to be advisable since an entirely different set of problems is involved (see MIS Report 143, "Municipal Regulation of Religious and Charitable Solicitations," December 1955). The "model" ordinances mentioned in this report may be obtained on loan from Management Information Service.

Provisions of the Regulatory Ordinance

Although three separate ordinances may be desirable to regulate all types of itinerant sellers effectively, each ordinance basically will contain the same provisions. The following section briefly outlines the main provisions of these ordinances and notes the important requirements which apply to a particular category of itinerants. This outline is based on provisions contained in the "model" ordinances prepared by the National Institute of Municipal Law Officers and the League of Wisconsin Municipalities.

Definitions. The persons to be regulated by itinerant ordinances must be described as fully as possible so that there will be no misunderstanding as to whom is intended to come under the purview of the ordinance. If farmers selling their own produce are to be regulated, such persons should be included expressly in the section on definitions. Any persons exempted from the ordinance should be specifically stated. The exemptions often may be part of the definition section or it may immediately follow the definitions.

Application for License. A person applying for a license to conduct house-to-house selling in the city should be required by ordinance to supply adequate information about his past and proposed activities if police regulation is to be effective. The type and amount of information required may vary in different cities, depending on the specific city and the specific category being regulated.

Information similar to the following should be required of the applicant: (1) name and physical description; (2) both permanent and local addresses and in the case of transient merchants, the local address from which sales will be made; (3) description of the nature of the business and goods to be sold; (4) name and address of the employer, if not self-employed, and credentials stating the exact relationship to the employer; (5) length of time desired to conduct business; (6) source of supply of goods to be sold, location of goods, and proposed method of delivery; (7) a recent photograph of the applicant; (8) a statement as to whether or not the applicant has been convicted of any crime or misdemeanor or any violation of any city ordinance other than traffic violations, the nature of any such offense, and the punishment or penalty; and (9) the last three cities where the applicant conducted business and addresses of business locations in those cities.

At the time of filing the application, the city may require the applicant to pay a specified fee to cover the cost of investigation.

Investigation and Issuance of License. After the person has applied for a license to conduct house-to-house selling activities in the city, the police chief should be legally responsible for conducting an investigation of the applicant's business and moral character to the extent that it seems necessary for the protection

of the public. If the police chief, as a result of the investigation, finds the applicant's character or business responsibility to be unsatisfactory, he should disapprove the application and state his reasons. The city clerk should notify the applicant that his application has been disapproved and that no permit or license will be issued.

Provision should be made for an appeal to the city council by any person dissatisfied by the action of the police chief or the city clerk in denying an application for a license.

If the police chief satisfactorily endorses the application, the city clerk issues the applicant his license after collecting the prescribed license fee. The license should bear the signature of the city clerk and show the name, address, and photograph of the licensee; the kind of goods to be sold; the amount of the fee paid; the issuance date and the length of time the license shall be in effect; and identifying description of any vehicle which the licensee is using in his business.

License Fees. Each city has to determine the amount of license fees which it will charge after an independent investigation of practices and legal requirements in the state in which the city is located.

License fees may be expressed in the ordinance in a variety of ways. For example, the NIMLO model ordinance establishes different classifications for license fees for the various categories. One category provides that no fee will be charged farmers selling products which they themselves have raised. In other categories the fee charged may be a flat rate per week, per month, or per year. Persons in the same category, but using different selling techniques may be charged different rates, e.g., for peddlars on foot; peddlers using hand-carts or pushcarts; peddlers using wagons, motor vehicles, or other conveyances; and an additional charge for each helper assisting a peddler in his work.

In the case of solicitors and canvassers, the NIMLO ordinance provides a provision whereby solicitors and canvassers engaged in interstate commerce may enter an administrative appeal to seek relief from a license fee which they feel places an undue burden upon such commerce. If a city attempts to levy a license tax on such persons, this provision should be included in the ordinance.

Requirement of Bond. In the case of solicitors and canvassers and itinerant merchants, cities often require applicants to file a surety bond with the city. One of the most common complaints registered against itinerant retailers is that when payments are made, delivery often is never received, or when merchandise is found to be defective, the guarantees are worthless and the citizen is without any recourse of action. For this reason a bond seems essential to protect purchasers against fraud and misrepresentation. This problem is not of too great importance in the case of peddlers since they make their delivery at the same time the sale is made and the citizen sees the product he is buying and has the opportunity to inspect it.

Identification Credentials. Cities should furnish every itinerant retailer with suitable identification, as a service to both the public and the itinerant. This identification may be in the form of special license plates and/or badges or other types of credentials. License plates should bear the words "licensed peddler" or "licensed solicitor." The itinerant should be required to wear his identification badge at all times and to show his identification credentials to prospective customers when he first makes contact with them.

Loud noises and use of streets. It is desirable that cities include in their ordinances regulations concerning the use of streets by itinerant retailers and the use of loud noises or any sound devices. Prohibition of the use of noise to attract attention and prohibition against the use of streets in congested areas are quite common in ordinances regulating itinerant retailers.

Revocation of License and Appeal. Ordinances regulating itinerants should contain the reasons for which licenses may be revoked after appropriate notice and hearing. The NIMLO ordinances contain the following causes: (1) fraud, misrepresentation, or false statements contained in the license application; (2) fraud, misrepresentation made in the course of carrying on business as peddler, solicitor, or itinerant merchant; (3) any violation of the ordinance; (4) conviction of any crime or misdemeanor involving moral turpitude; (5) conducting business in an unlawful manner or in such a manner as to constitute a breach of the peace or to constitute a menace to the health, safety, or general welfare of the public.

Here again, provision should be made for appeal to the city council by any person who believes his license is being revoked without sufficient cause.

Penalties. The ordinance should contain penalties for persons convicted of violating any of the provisions of the regulatory ordinance. The penalty may be a fine or imprisonment, or both fine and imprisonment.

Enforcement of Regulations for Itinerants

An effective enforcement program of ordinances regulating peddlers, solicitors and itinerant merchants depends upon a thorough investigation of the applicant before the permit is issued and a good identification system for persons licensed to conduct such business. Municipal regulation of itinerants in a large measure depends upon an informed citizenry to report persons suspected of operating outside of the regulatory ordinance or of conducting business in a fraudulent manner.

Municipal Enforcement. Maywood, Ill. (27,473), in 1955 adopted an ordinance which requires every peddler, solicitor or canvasser, and itinerant vendor to secure an official identification card through the police department before engaging in business within the city. The ordinance was adopted in the interest of furthering the protection of citizens of the village against fraudulent representations. Legitimate peddlers and solicitors operating in the city agree that the ordinance does not restrict opportunities to do business, and that it aids in controlling illegitimate merchandising and soliciting and protects the public in general.

Before issuing a license and an identification card the Maywood police department makes a thorough investigation of the applicant's background and character. Peddlers and solicitors are requested to wear the identification cards on their outer garments where it is in view of all persons with whom they come in contact. The cards bear the signature, photograph, and right thumb print of the bearer, the expiration date of the license, the serial number, and initials of the police chief or reviewing officer who approved the issuance of the identification card. Citizens are required to report to the police department any peddlers or solicitors not having identification cards, who approach them on the street or at home or work.

Winnetka, Ill. (12,105) several years ago developed an effective enforcement program to regulate canvassers and solicitors. Fingerprints are taken of each applicant, with one set being kept in the police department files and the other checked with the Federal Bureau of Investigation in Washington, D. C. If the applicant has no criminal record, the fingerprints are filed in the personal identification section of the FBI. In the first six weeks in which the ordinance was in

effect, 183 permits for soliciting and canvassing were issued. Of the applicants fingerprinted in that period, 26 were found to have had prior police records, and 14 of these were serious enough to deny permits. Four applicants were found to be wanted by other authorities, and of these two were apprehended.

The Winnetka police seek cooperation of housewives in enforcing the ordinance by asking them to request any solicitor who calls on them to show his permit card, to examine it closely to see that the expiration date has not passed, and to check the description given on the reverse side of the permit card. Housewives are asked to call the police immediately if the solicitor has no permit or if there seems to be any discrepancy in the date or description.

Better Business Bureaus. Better Business Bureaus often are a valuable aid in providing city officials and citizens with information about itinerant retailers. One of the objectives of the Better Business Bureau is to "conserve and protect the buying power of the community against loss to fraudulent promotions and fly-by-night schemes and channel public resources into responsible sources of spending and investment."

Better Business Bureaus carry on a continuous public education program to promote better understanding of business on the part of consumers. They often will publicize fraudulent schemes taking place within the community, and through the National Better Business Bureau in New York City, can often aid city officials to obtain information about persons proposing to operate within the community.

In the case of magazine solicitors, the National Better Business Bureau maintains a "central registry" of publishers and agencies that guarantee that magazines ordered from their solicitors will be delivered. When a subscription agency listed with the "central registry" begins operations in a city, it notifies the local Better Business Bureau and gives them the names of all their agents. Citizens who then are approached by a solicitor may contact the Bureau to see if the solicitor is listed with them and if the agency is listed with the "central registry". Of course subscription agencies not registered with the National Better Business Bureau are not necessarily fraudulent. The National Better Business Bureau also maintains a similar registry for book publishers, particularly those who sell encyclopedias.

* * * * *

Note: Grateful acknowledgment is made to the following persons who furnished information and suggestions which were useful in the preparation of this report: Howard E. Crush, executive assistant to city manager, Cincinnati, Ohio; Warren G. Elliott, former assistant city attorney, Pueblo, Colo.; Charles T. Henry, village manager, Shorewood, Wis.; Hugh T. Henry, village manager, Lombard, Ill.; Gayle T. Martin, village manager, Maywood, Ill.; C. R. Miller, village manager, Winnetka, Ill.; and G. M. Robbins, director, research and budget department, Kansas City, Mo.

